IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1236
No. 77-1237
No. 77-1269

GENERAL ATOMIC COMPANY,

Petitioner,

against

EDWIN L. FELTER, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO AND MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

WHITNEY NORTH SEYMOUR
Attorney for Respondent
Indiana & Michigan Electric Company
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

ROGERS M. DOERING
ALBERT X. BADER, JR.
LINDSAY A. LOVEJOY, JR.
Simpson Thacher & Bartlett
JAMES T. PAULANTIS
Johnson, Paulantis & Lanphere
Of Counsel.

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Indiana & Michigan Electric Company ("I&M") submits this brief in opposition to three petitions filed by General Atomic Company ("GAC") which seek to invoke the appellate jurisdiction of this Court: Nos. 77-1236 and 77-1269 request this Court to examine by certiorari the refusals of the New Mexico Supreme Court to issue extraordinary writs to review interlocutory orders of the state district court entered during the trial of *United Nuclear Corporation* v. *General Atomic Company, et al.* (*"UNC* v. *GAC"*), which is still continuing. No. 77-1237 seeks leave to file a petition to examine by mandamus an order of the state district court, which is currently before the New Mexico Supreme Court on GAC's appeal. A stay pending consideration of the several petitions was denied by this Court on March 20, 1978.

Questions Presented

In No. 77-1236:

1. Whether, on the facts of this case, the New Mexico Supreme Court was constitutionally required to issue an extraordinary writ to review mid-trial discovery rulings which were fully reviewable on appeal?

2. Whether the order denying such writ is not moot since entry of a later order, also interlocutory, finding GAC in default for bad faith noncompliance with numerous discovery obligations and resolving against it the issue of liability?

3. Whether the New Mexico Supreme Court was constitutionally required to issue an extraordinary writ to halt a state court trial because GAC contended that the trial might involve adjudication of an alleged "act of state" defense, when the actions of the trial court in respect of such defense were fully reviewable on appeal?

4. Whether the question of adjudicating the aforementioned defense is not moot in view of the entry of an order resolving the issue of liability without reaching the "act of state" defense?

In No. 77-1237:

5. Whether questions of compliance with the mandate of this Court in *General Atomic Company* v. *Felter,* No. 76-1640, —— U.S. ——, 98 S. Ct. 76 (Oct. 31, 1977), should be reviewed by this Court when they are pending on review in the New Mexico Supreme Court and the trial court fully complied with the mandate?

In No. 77-1269:

6. Whether the New Mexico Supreme Court was constitutionally required to issue an extraordinary writ directing a trial court to submit for review, in advance of entry, a mid-trial discovery order concerning the sanctions, if any, to be imposed for one of GAC's numerous failures to provide discovery?

7. Whether the denial of such writ was not rendered moot by the entry of an order imposing sanctions and a partial judgment on GAC for bad faith noncompliance with discovery?

Jurisdiction

We suggest that the issues raised in No. 77-1236 and No. 77-1269 have become moot. We also submit that the issuance of a writ of mandamus to an inferior state court, as requested in No. 77-1237, is without precedent or justification. While the jurisdiction of this Court may not be absolutely precluded by 28 U.S.C. § 1257(3) and § 1651, we submit that these petitions invite a procedure which law and discretion firmly counsel against, namely, interlocutory review of non-final orders of a state trial court before any reasonable opportunity for review by the New Mexico Supreme Court.

Counterstatement of the Case

We regret that GAC's statement of the facts is materially inaccurate. Because consideration of such petitions requires reference to parts of the proceedings in the trial court which are not adequately set forth in the petitions, this Brief in Opposition, submitted in all three cases, is longer than we would wish. Where none of the usual grounds for certiorari can be cited or exists, their absence can best be indicated by some explanation of the morass in which the Court is asked to become involved. We have, as far as possible, avoided asserting without citation, as GAC does, matters outside the record.[1]

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1. The substance of the petition in No. 77-1269 in fact seems to be an attack upon the trial court's March 2, 1978 Sanctions Order and Default Judgment (Pet. 1269, 2a), which had not even been issued when the New Mexico Supreme Court took the action sought to be reviewed. (The citation "Pet. 1269, 2a" refers to page 2a of the Petition in No. 77-1269. Other citations to petitions are in similar form.)

Background

In 1968 United Nuclear Corporation ("UNC") undertook to supply I&M with uranium and fabricated nuclear fuel (The contract is dated as of August 18, 1967). Later Gulf Oil Corporation ("Gulf") assumed the contractual obligation although UNC remained liable to I&M. Gulf contracted with UNC ("1973 Supply Agreement") to purchase the uranium needed to fulfill the contract with I&M and similar contracts with three other utilities, Detroit Edison Company ("Detroit"), Commonwealth Edison Company ("Commonwealth"), and Duke Power Company ("Duke"). GAC, a partnership composed of Gulf and Scallop Nuclear, Inc., was formed in 1974 and assumed, among other things, Gulf's contractual obligations to I&M, Detroit, Commonwealth and Duke and its rights against UNC under the 1973 Supply Agreement.

In December 1975 UNC sued GAC in the state district court in Santa Fe, New Mexico,[2] alleging, *inter alia,* that the 1973 Supply Agreement was invalid by reason of fraud, commercial impracticability, and violations of the New Mexico antitrust laws, N.M.S.A. §§ 49-1-1 through 49-1-3 (*"UNC* v. *GAC"*). I&M was not initially a party to *UNC* v. *GAC.*

GAC defaulted on its obligations to I&M, and in February 1976 I&M sued GAC and Gulf in federal court in New York (*"I&M* v. *Gulf"*, S.D.N.Y., No. 76 Civ. 881 (MEF)). This suit was dismissed for want of an indispensable party (UNC) on GAC's motion in January 1977.

2. A substantially identical suit by UNC against GAC and its constituent partners, separately named, was filed in state court in August 1975 but was voluntarily dismissed; a suit by UNC against I&M making similar allegations was filed in the District Court for McKinley County, New Mexico, and subsequently removed to the U.S. District Court for the District of New Mexico, where it is currently pending but inactive.

The Discovery Issues; GAC's Default (Nos. 77-1236 and 77-1269)

I&M was joined as a defendant in *UNC* v. *GAC* at the behest of GAC on January 21, 1977. GAC sought affirmative relief against I&M; I&M asserted claims against GAC and Gulf, one of its constituent partners.[3] The nonjury trial commenced on October 31, 1977. GAC's claim (Pet. 1236, 5) that the uranium cartel was not an issue until August 1977 ignores the facts that (a) UNC's complaint filed December 1975 pleaded antitrust causes of action; (b) in October 1976 I&M sought to plead antitrust claims in its case in federal court in New York, which was dismissed at the instance of GAC and Gulf; and (c) I&M renewed its antitrust claims in its pleadings in the court in New Mexico, beginning with its Answer and Counterclaim served March 4, 1977.

On November 18, 1977 the trial court entered an order, one of a series entered on motions by which UNC and I&M attempted to compel good faith disclosure by GAC,[4] finding (Pet. 1236, 2a) that GAC had deliberately housed cartel

3. Gulf is a party individually and in its own right because the partnership affirmatively commenced this proceeding against I&M, *Scott* v. *United States,* 354 F.2d 292 (Ct. Claims 1965), and is also liable individually for partnership obligations because its New Mexico statutory agent was served with summons. N.M.S.A. § 21-6-5. Gulf has not moved against the summons. Whether or not a separate "claim" (28 U.S.C. § 1441(c)) is stated against Gulf for removability purposes (Pet. 1269, 10) is a separate issue from whether Gulf is a party—which it is.

4. After undertaking to produce all relevant documents and to interview its present employees in Canada and the United States to answer interrogatories, GAC served responses on September 26, 1977 which produced virtually no documents, provided merely lists of documents and included self-serving definition sections, but furnished hardly any responsive information, and took the position for the first time that to produce any Canadian documents would violate the Canadian Uranium Security Regulations. In its original motion UNC argued, partly in reliance upon deposition evidence from a former Gulf Minerals Canada Limited ("GMCL") employee (L. T. Gregg), that GAC and Gulf had a deliberate policy of placing documents in Canada to avoid U.S. process. UNC Memorandum 9/30/77, at 5, 6. GAC did not rebut this proof. The trial court, on October 11,

documents in Canada to prevent discovery, and it ordered GAC to "identify" all relevant cartel documents in Canada. It did not direct GAC to produce documents contrary to Canadian regulations but stated that, if they were not produced, facts provable from them would be found against GAC. It also scheduled submission of proposed findings and briefs.

GAC did not then seek relief from the November 18 order in the state supreme court. On December 9, 1977, however, I&M (joined by UNC and Detroit) moved again to compel GAC to provide complete and good-faith responses to certain interrogatories, pointing out that GAC had not provided information damaging to GAC which other sources demonstrated it had in its possession, had refused even to list relevant documents located in Canada, and had made no inquiry of any employees in Canada despite having promised to do so.[5] On December 27, 1977, the trial court granted I&M's motion in part, directing good-faith, non-evasive answers and giving leave to apply for further relief under Rule 37 of the New Mexico Rules of Civil Procedure (which parallels F.R.Civ.P., Rule 37) should GAC's answers remain inadequate.

1977, directed GAC to answer in good faith or face sanctions (Pet. 1236, 28a-33a). The November 18 order arose out of a motion for sanctions addressed to GAC's supplemental answers. Again GAC claimed that it was unable to furnish the Canadian documents but made no effort to rebut the claim that it had deliberately lodged cartel documents in Canada to avoid production (Trial Tr. 11/16/77, 11-43 to 75).

5. For example, I&M had obtained minutes of cartel meetings from Gulf files, which had been sent to GMCL by cartel officials. GAC took the position that it had no knowledge of such meetings, much less what happened there, unless one of its present U.S. employees had attended them (GAC Supplemental Answers to UNC's Second Interrogatories, 10/20/77, 3). At the same time, it denied that certain events reflected in the minutes had ever occurred (I&M Memorandum 12/9/77, 8). GAC's contention that the February 1978 motions by I&M and UNC for Rule 37 sanctions "raised for the first time allegations of general bad faith" (Pet. 1269, 7) in disclosure about the cartel is simply erroneous.

On January 5, 1978 GAC petitioned the state supreme court for "Mandamus and Prohibition Under Power of Superintending Control" to review, *inter alia*, the November 18, 1977 order, requesting a stay of the trial and an alternative writ[6] directing responsive pleadings, settlement of a record, and briefs. Without requesting responses the court, on January 11, 1978, heard oral argument and refused, without opinion, to issue the alternative writ. This order is the subject of the petition No. 77-1236.

The argument of January 11, 1978 clearly establishes that the New Mexico Supreme Court was unwilling to indulge GAC's use of an extraordinary writ as a premature appeal (Tr. 1/11/78, 23; *id.* 59, 66, 67). GAC's counsel frankly conceded that the merits of the trial court's orders could not be considered unless the court granted the alternative writ and ordered up a substantial record. (Tr. 1/11/78, 66-68). On February 1, 1978, when GAC moved for a stay pending certiorari, the state supreme court again made clear that in denying the petition it acted without prejudice to an appeal, reserving all issues for review on appeal (Tr. 2/1/78, 8-10). GAC's counsel recognized that the court had acted out of concern over prematurity and "piecemeal appeals" (Tr. 2/1/78, 12) and conceded that the November 18 order was not final for appellate purposes (Tr. 2/1/78, 15-16).[7]

6. This "alternative writ" procedure—in function an order to show cause directed to the trial court—is customary in New Mexico for petitions to review decisions of an inferior court.

7. The state supreme court directed that the trial court, before imposing sanctions for failure to make discovery, give notice sufficient to permit the parties to make further motions in the supreme court. (Pet. 1236, 47a). Responding to that direction, the trial court issued a notice (Pet. 1236, 51a) on Febuary 20, 1978 of its intention to enter a sanctions order on or after March 1, 1978. GAC then made a motion in the state supreme court to stay any Rule 37 sanctions order.

GAC served supplemental interrogatory answers on February 1, 1978; I&M and UNC again moved for Rule 37 sanctions on the ground that the answers were defective, violative of the court's orders, and made in bad faith. I&M noted, *inter alia,* that (a) GAC's answers contradicted prior representations of its counsel and responses Gulf had provided to a Federal Grand Jury in Washington, D.C. investigating the uranium cartel; (b) GAC withheld information known to its former employees who were employed while the case was pending; (c) GAC refused to provide information known to employees or attorneys in Canada, although it had undertaken to do so and had been ordered to do so; (d) GAC's answers were on their face self-contradictory as to such basic matters as cartel meetings and the cartel rules; (e) certain of GAC's answers were demonstrably false; (f) GAC withheld information about Gulf's negotiations to sell its Canadian uranium to United States customers; (g) GAC refused to make discovery about the cartel's predatory conduct toward Westinghouse Electric Corporation, although there is clear evidence of such conduct; and (h) GAC refused to provide any factual basis for its defense that Gulf was forced to join the cartel and to fix quotas and prices.

On February 20, 1978 GAC renewed its request in the state supreme court for an alternative writ, seeking a stay of any sanctions the trial court might impose under Rule 37 and review of any such sanctions *prior* to their entry. GAC did not assert that due process required such pre-entry review and thus cannot comply with Rule 23(f) of this Court. At argument on March 1, 1978, opposing counsel argued that GAC's application was defective under New Mexico law, viewed either as a new petition, because unsworn (Rule 12(a), N.M.R. App. P.); or as a renewal of the petition dismissed on January 11, 1978, because there is no provision in New Mexico for such renewal. I&M and

UNC argued against a stay of sanctions, pointing to their pending Rule 37 motions, based on GAC's persistent refusal over two years to provide complete, good-faith responses to interrogatories and document production. GAC responded that these motions were not before the court (Tr. 3/1/78, 13). The court on March 2, 1978 refused the requested stay or the alternative writ (Pet. 1269, 1a). That decision is the basis of the petition in No. 77-1269.

The trial court on March 2, 1978 acted on the motions of I&M and UNC, found GAC in default on the issue of liability, and entered the "Sanctions Order and Default Judgment." That order is interlocutory and has since been amended.[8] GAC has not yet sought to bring it before the New Mexico Supreme Court. Instead, it urges this Court to disregard the usual jurisdictional limits and review the trial court's order as a matter "ancillary" (Pet. 1269, 15) to the order of the New Mexico Supreme Court.

The Arbitration Issues (No. 77-1237)

On April 2, 1976, before I&M was made a party to *UNC* v. *GAC,* the trial court enjoined both parties from initiating new proceedings concerning the matters in suit (Pet. No. 76-1640, la). GAC petitioned the New Mexico Supreme Court for review by mandamus.[9] That court denied relief,

8. The sanctions order was amended by the trial court on March 27, 1978; the full text of the amended order is an appendix to UNC's brief in response to the petitions for certiorari.

9. I&M was not a party to this proceeding. GAC sought simultaneously (a) an order dissolving the injunction and (b) a direction that I&M, Detroit, Duke, and Commonwealth be joined in *UNC* v. *GAC* on the ground that they were parties necessary for "a just adjudication." GAC sought no stay of the proceedings in *UNC* v. *GAC,* nor did it assert a desire to arbitrate; rather, it argued that the four utilities should be joined in the pending state action to prevent GAC's obligations to deliver to the utilities from being adjudicated separately from UNC's obligations to deliver to GAC, creating the possibility of "inconsistent" results.

and GAC sought certiorari in this Court (Pet. No. 76-385). GAC's petition said nothing about arbitration but claimed that its effort to join UNC in *I&M* v. *Gulf* under F.R.Civ.P. Rule 14 was stymied by the Santa Fe court's order (Pet., No. 76-385, 2, 10, 12-16). GAC told this Court that a ruling on the contested injunction would not "advance the termination of the Santa Fe litigation . . ." (Reply No. 76-385, 5).

This Court granted certiorari and remanded for clarification of whether the decision below was based on a non-federal ground. *General Atomic Company* v. *Felter,* 429 U.S. 973 (1976). After clarification GAC again sought certiorari (Pet. No. 76-1640). GAC repeatedly stressed that its

> "great concern was to avoid the threat of inconsistent adjudications posed by the UNC litigation and UNC's refusal to supply the required uranium, on the one hand, and threatened litigation by the utilities seeking to compel GAC to perform the utility contracts originally made by UNC, on the other" (*id.* 8),

adding that as to the I&M and Detroit contracts, which have no arbitration provision, the threat had now been averted: GAC had secured dismissal of *I&M* v. *Gulf* "[u]pon GAC's undertaking to attempt to join I&M in the Santa Fe action." I&M and Detroit were so joined on January 21, 1977 at GAC's request (*id.* 12). GAC said that the problem persisted as to the Duke and Commonwealth contracts, since those utilities had invoked their contractual right to arbitrate with GAC (Pet. No. 76-1640, 13-15, 20-24).[10]

10. GAC specifically denied having plans for federal litigation against UNC outside New Mexico, except to bring UNC into proceedings brought by the utilities against GAC (*id.* 20n), and conceded that it could compel UNC to arbitrate in federal court only "in an impleader context" employing "ancillary jurisdiction" (*id.* 22n),

On this record this Court held on October 31, 1977 that the injunction should be vacated insofar as it barred *in personam* actions in federal courts. *General Atomic Company* v. *Felter,* _____ U.S. _____, 98 S.Ct. 76 (Oct. 31, 1977). This Court observed that the principal federal litigation which GAC sought to pursue was the defensive impleader of UNC in proceedings by utilities against GAC to reduce the "risk of inconsistent adjudication" (*id.* 79 n.11). In due course the trial court modified the injunction to exclude "all *in personam* actions in Federal Courts and all other matters mandated to be excluded . . . by the opinion" of this Court (Pet. 1237, 27a).

Reversing the position it took in this Court, GAC then served upon UNC a demand to arbitrate with UNC alone issues arising under the 1973 Supply Agreement.[11] GAC's demands excluded issues relating to I&M and Detroit.[12]

GAC did not avail itself of its right, confirmed by this Court's mandate, to initiate federal litigation. Instead, on December 6, 1977 it moved the trial court for a stay of

since there is no diversity between UNC and GAC (see also Reply No. 76-1640, 10n, 13n (July 27, 1977)). The Federal Arbitration Act has been construed consistently not to provide a basis for federal-question jurisdiction. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 271 F.2d 402 (2 Cir. 1959), *appeal dismissed,* 364 U.S. 801 (1960); *The Mengel Co.* v. *Nashville Paper Products & Specialty Workers Union,* 221 F.2d 644 (6 Cir. 1955); Wright, Miller and Cooper, *Federal Practice and Procedure,* § 3569 (1975 ed.). GAC had opposed arbitration with Duke and Commonwealth but lost. *See General Atomic Company* v. *Duke Power Co.,* 420 F. Supp. 215 (W.D.N.C. 1976); *Commonwealth Edison Co.* v. *Gulf Oil Corp.,* 541 F.2d 1263 (7 Cir. 1976).

11. GAC also served upon UNC demands to arbitrate under the Duke and Commonwealth contracts.

12. GAC's demand to arbitrate pursuant to the 1973 Supply Agreement states:

> "2. Utility Issues excluded from the scope of this arbitration demand are those issues relating to GAC's obligations (if any) to Detroit Edison Company and Indiana & Michigan Electric Company under certain agreements with those utilities.

proceedings not only on the issues on which GAC demanded arbitration but also on issues not within its demands.[13] The trial court found on December 16, 1977, (i) that the Duke and Commonwealth contracts gave GAC no right to arbitrate with UNC, (ii) that GAC had committed numerous acts of waiver by, *inter alia,* its participation in litigation both before and after the injunction reviewed in No. 76-1640 and had expressly waived arbitration under the 1973 Supply Agreement in its answer, and (iii) that nonarbitrable antitrust issues were intertwined with issues that GAC sought to arbitrate (Pet. 1237, 1a-8a). The court refused to stay the trial and stayed GAC from pursuing the arbitration demands (Pet. 1237, 10a), with the proviso

> ". . . that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings." (*id.*)[14]

GAC appealed to the New Mexico Supreme Court and moved that court to stay the entire trial and expedite the

> It is GAC's desire that to the extent possible any disputes between GAC and UNC regarding the meaning of the utility contracts or GAC's obligation under those utility contracts be resolved in appropriate forums where the representative utility, GAC and UNC are all present." (Pet. 1237, 43a).

Since neither Detroit nor I&M had any agreement to arbitrate, the appropriate forum where they would be present with UNC and GAC was the New Mexico trial court.

13. GAC's statement that it "requested Judge Felter to stay trial proceedings with respect to issues subject to these arbitration demands" (Pet. 1237, 9) is misleading. While GAC initially excepted some issues (GAC Motion, 11/30/77), by the time it got to the state supreme court (GAC Reply to I&M brief, 3/30/78, 1) and this Court (Pet. 1269, 13; Pet. 1237, 1) it insisted on a stay as to all issues on trial.

14. On December 27, 1977 the court amended its decision to make clear that GAC's asserted right to a stay under the Federal Arbitration Act, 9 U.S.C., § 1, *et. seq.*, was also adjudicated (Pet. 1237, 11a-19a).

briefing schedule on the arbitration appeal. After argument that Court by order dated January 13, 1978 denied the stay and postponed the scheduling issue until the transcript was filed, whereupon "we will consider an abbreviated schedule of briefing and set the cause down for oral argument as soon as possible." (Pet. 1237, 22a).

On January 26, GAC again asked the state supreme court to stay the trial pending GAC's petition in this Court (which was never filed) with respect to the January 13, 1978 order. The stay was denied on February 1, 1978 (Pet. 1237, 23a). The state supreme court expedited the briefing schedule on February 22, 1978 but later extended it at GAC's request. The appeal has been briefed and awaits argument, scheduled for May 2, 1978. GAC has advised the New Mexico Supreme Court that:

> "General Atomic Company's Motion for Leave to File a Petition for Writ of Mandamus in the United States Supreme Court does not seek review of all arbitration questions pending in this Court. It seeks only immediate extraordinary relief concerning GAC's claims that Judge Felter has violated the prior decision of that court which invalidated his previous injunction. It was filed only after this Court three times declined to stay the trial or otherwise to grant GAC immediate relief from Judge Felter's orders (See this Court's Orders of January 13, 1978, February 1, 1978 and March 2, 1978)." (Appellant General Atomic Company's Reply Brief, No. 11,775, N.M.S.-Ct., March 30, 1978, vii).

Currently GAC is urging in the New Mexico Supreme Court appeal that (a) the trial court acted inconsistently with the mandate in No. 76-1640, (b) the Federal Arbitration Act governs the proceedings because of the nature of the contracts involved, (c) the trial court erred in finding waiver, (d) waiver is an issue for the arbitrators, (e) state

antitrust claims were erroneously held nonarbitrable, (f) the trial court erroneously construed the Duke and Commonwealth contracts in finding GAC could not require UNC to arbitrate thereunder, and (g) the trial court erred in finding waiver from record facts without an evidentiary hearing. It is therefore not clear what questions GAC would have this Court consider without the benefit of review by the state supreme court, but they are apparently numerous as well as obscure.

Reasons for Denying the Writs

I.

In the Certiorari Proceedings (Nos. 77-1236 and 77-1269)

a. The decisions below rest upon an adequate and independent state ground, and the issues are moot.

The decisions of the New Mexico Supreme Court of January 11, 1978 and March 2, 1978 were based upon adequate and independent state grounds. The statements at argument make it plain that the court did not consider and rule upon the merits of GAC's attack on the November 18 order. (Tr. 1/11/78, 59-66; Tr. 2/1/78, 8-10, 12, 14-18). GAC conceded that the court could not undertake review of that order unless it first issued an alternative writ and directed preparation of a record to determine the bases of the trial court's order. (Tr. 1/11/78, 66-68). The court issued no writ and requested no record. Plainly it dismissed the January petition on a procedural ground, the obvious one being that the court viewed an extraordinary writ proceeding in the middle of a pending trial, to review the bases for an interlocutory discovery order which did not even specify sanctions, as a needless and inappropriate mode of procedure, when the same issues could be resolved

on appeal if they still remained after final judgment. Subsequent events confirmed the wisdom of this approach, since the trial court soon granted I&M's and UNC's Rule 37 motions, made after the November 18, 1977 order, and imposed sanctions for GAC's discovery misconduct throughout the case.

We respectfully submit that the November 18 order, except to the extent it is reflected in the March 2, 1978 "Default Judgment and Sanctions Order," as amended, has exhausted its effect and is now moot, and that any further proceedings in this Court predicated on that order are similarly moot.

If GAC claims (in No. 77-1269) a constitutional right to interlocutory review of Rule 37 sanctions *before* they are made public, that issue is moot because the sanctions have been entered. If GAC claims a right to such review *after* sanctions are imposed, it cannot press that claim in this Court because it has not yet been made in the state courts.

GAC seems to concede (Pet. 1269, 15), as it must, that its application of February 20, 1978 was dismissed on state procedural grounds. Indeed, GAC claims that the decision not to hear its claims *instanter* violated its federally protected rights (Pet. 1269, 5, 12, 15). Understandably, this argument is advanced without case support; it has no merit. The same antipathy to piecemeal review prevails in the federal system without colorable constitutional challenge, *see Kerr* v. *United States District Court,* 426 U.S. 394 (1976); moreover, the states are free to choose among various systems of interlocutory or final-order review since in general there is no constitutional obligation to provide any appellate review, *Ortwein* v. *Schwab,* 410 U.S. 656, 660 (1973); *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956), and the timing of such review as may be provided raises no constitutional issue, especially in a case like this where there is no irreparable harm.

The New Mexico cases make clear that extraordinary writs may not be employed to raise issues which will later be reviewable on appeal. *See, e.g., Baca* v. *Burks,* 81 N.M. 376, 378, 467 P.2d 392, 394 (1970); *Alfred* v. *Anderson,* 86 N.M. 227, 230, 522 P.2d 79, 82 (1974). It cannot be contended that such principles of appellate economy do not constitute an adequate state ground when similar rules are mandated for the federal system. *See, e.g., Kerr* v. *United States District Court, supra,* 426 U.S. at 402 (1976); Ex parte *Fahey,* 332 U.S. 258 (1947).

A state court ruling which rests upon an independent and adequate ground of state law, such as well-established local procedural rules, is inappropriate for review. *Wolfe* v. *North Carolina,* 364 U.S. 177, 193 (1960). *See also Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861, 866 (1974); *Wainwright* v. *Sykes,* 433 U.S. 72, 86-87 (1977). This Court recently stated:

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's Inc.,* 355 U.S. 597 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945)." *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 566 (1977).

The review GAC seeks in No. 77-1236 would be doubly advisory, since the court below refused to consider the issues for sufficient state-law reasons, and the order sought to be reviewed is moot.

Were this Court to view the widely-shared procedural concerns of the state supreme court as falling short of an independent and adequate state ground, we submit that the only relief available to GAC in this Court would be a remand for consideration of the federal issues, because the record in the abbreviated proceeding below is inadequate for consideration of such issues in this Court. The abstract nature of GAC's present complaints provides a further strong argument against a grant of discretionary review. *See, e.g., Wainwright* v. *City of New Orleans,* 392 U.S. 598 (1968); *Rescue Army* v. *Municipal Court,* 331 U.S. 549 (1947). Moreover, since appellate review on a full record in New Mexico is foreordained it would serve no purpose to grant certiorari.

b. The ruling below adheres to this Court's decision in *Société Internationale* v. *Rogers.*

Contrary to GAC's current claim (Pet. 1269, 14-15) nothing the trial court did on November 18, 1977 or March 2, 1978 raises any questions under this Court's ruling in *Société Internationale* v. *Rogers,* 357 U.S. 197 (1958).

GAC charges, wrongly, that the trial court "provided no opportunity" (Pet. 1269, 15; see also Pet. 1269, 7-8) for a hearing on GAC's discovery efforts. In fact GAC's refusal to answer interrogatories was briefed at great length and appears of record, its nonproduction of documents is undisputed, the reasons for such nonproduction were the subject of a hearing at which GAC offered testimony and GAC has proffered affidavits on the same question. Since GAC does not contest on these petitions the recitals of fact set forth in the March 2, 1978 order it is established for present purposes that Gulf maintained its sensitive cartel records in Canada to prevent discovery; the evidence, the admissibility of which was stipulated, is to the same effect. GAC points to no disputed factual issue on which it should have

had a hearing, and the trial court made lengthy findings concerning GAC's persistent bad faith in document production and every other aspect of the discovery process (Pet. 1269, 4a-17a). If these findings are to be reviewed in this Court, such review should not be based on such lawyers' arguments as the "brief review" of GAC's discovery allegations (Pet. 1269, 36a-39a),[15] but rather on a full record after the trial court has made them final,[16] and the New Mexico Supreme Court has considered them. As yet that court has seen neither the findings nor the record.

The trial court scrupulously followed the teachings of *Société*. GAC was not ordered to violate Canadian criminal law (Pet. 1236, 13-15, 17); the trial court's October 11, 1977 order required GAC to produce documents only "[i]nsofar as it is lawful so to do" (*id.* 32a), a qualification the court repeated on December 27, 1977 (*id.* 44a-46a). The November 18, 1977 order expressly says that if the documents could not lawfully be produced despite GAC's best efforts, the court would not require their production in violation of Canadian law but would instead consider what Rule 37 sanctions were appropriate on the facts (*id.* 45a). This procedure follows precisely the course laid down in *Société*, where this Court held that a party was correctly directed to produce documents despite possible Swiss law prohibitions (357 U.S. at 204-06) and that all the reasons for nonproduction would be examined in considering sanctions (*id.* 208-13).[17] As to such reasons, the government charged

15. The "brief review" is grossly inaccurate. For example, it states that counsel for UNC disclaimed any desire for production of documents in Canada (Pet. 1269, 38a). In fact, the remarks quoted by GAC out of context refer to an audacious attempt by GAC to assert foreign law as an obstacle to production of cartel evidence already in the United States.

16. *See* note 8 *supra*.

17. The evidence in *Société* showed that the party undertook just the sort of "diligent and long-term negotiations" with a foreign government that GAC says courts may not require (Pet. 1269, 9). *See* 357 U.S. at 201-03.

in *Société* that the party currently unable to produce documents had years before brought itself into the ambit of Swiss secrecy laws to hinder disclosure, and the Court said that, if proved, such facts would have a "vital bearing" on the case:

> "In other words, the Government suggests that petitioner stands in the position of one who deliberately courted legal impediments to production of the Sturzenegger records, and who thus cannot now be heard to assert its good faith after this expectation was realized. Certainly these contentions, if supported by the facts, would have a vital bearing on justification for dismissal of the action, but they are not open to the Government here." 357 U.S. at 208-09.

Here, the trial record emphatically supports the recitals of fact (not here disputable) in the March 2, 1978 "Sanctions Order and Default Judgment" that Gulf deliberately kept its cartel files in Canada to be out of subpoena range (Pet. 1269, 15a-16a),[18] precluding any further claims of good faith. Thus, the trial court's sanctions do not rest solely on the insufficiency of GAC's court-ordered efforts to produce the evidence hidden in Canada, as GAC suggests (Pet. 1236, 6-10). Even so, GAC's last-minute meeting with Canadian officials gave more proof that GAC's discovery efforts were insufficient and that likely avenues of disclosure had been overlooked.[19] In any event, the sanc-

18. A similar finding appears in the November 18, 1977 order (Pet. 1236, 3a).

19. The "report" by GAC's lawyers on the March 3, 1978 meeting (Pet. 1269, 43a) postdates the decision below and obviously was not in the record, but it shows that Canadian government lawyers took the view that (a) Canadian employees could disclose nondocumentary information about the uranium cartel, (b) it was unclear what identification of uranium cartel documents was permissible, and in any case (c) no Canadian government officials could construe the nondisclosure regulations, since their interpretation is for the Canadian courts (Pet. 1269, 46a-48a).

tions ordered by the trial court were based not only on nonproduction of Canadian documents but on a long history of wholesale resistance to discovery.

GAC's assertions that the trial court erroneously overrode Canadian policy in violation of *Zschernig* v. *Miller,* 389 U.S. 429 (1968), similarly cannot withstand examination.[20] To the contrary, as to the Canadian regulations impeding document production, the trial court hewed to the precise precedent of *Société,* where this Court outlined procedures for handling the difficult but unavoidable problems of foreign-law obstacles to discovery.[21] Thus, the trial court ordered the production of documents from Canada not because it rejected Canadian law but because GAC concededly failed to comply with discovery requests, and the

20. In *Zschernig* this Court recognized that state courts are required to construe foreign laws at times, 389 U.S. at 433, but held that the Oregon legislature had infringed on the exclusive presidential and congressional power to conduct foreign affairs by imposing inheritance rules which directed application of arbitrary, highly subjective and critical standards to the laws of foreign, and particularly "iron curtain" countries. Particularly bothersome to the Court in *Zschernig* was the statute's call for judicial interpretation which "led into minute inquiries concerning the actual administraton of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied 'the right to receive' . . ." *id.* 435. The trial court here did not indulge in such an abrasive inquiry; indeed all adjudication ceased except as to damages, because of GAC's refusal to provide discovery.

21. The petitioner in *Société* did not argue that United States courts should affirmatively enforce a foreign confidentiality law, but the opinion (357 U.S. at 212) precludes such a contention, at least in the absence of a treaty or similar agreement, a matter not involved here. *United States* v. *Belmont,* 301 U.S. 324 (1937), and *United States* v. *Pink,* 315 U.S. 203 (1942), cited by GAC (Pet. 1236, 3), likewise involved the effect of treaties and executive agreements. *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936) is even more irrelevant.

structure of Rule 37 requires a judicial order before sanctions may be considered, as contemplated by *Société.*[22]

The Rio Algom case, In re *Westinghouse Electric Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10 Cir. 1977), is likewise consistent with the trial court's ruling, for there the court noted that the company acted in good faith and that it had not deliberately shielded documents from disclosure under foreign law. *See* 563 F.2d at 996, 998.[23] This case presents facts opposite from those in the Rio Algom case and *Société—i.e.,* here there was proof that documents were lodged in Canada to avoid discovery—but it was decided on the same principles. Any claim of conflict is specious.

c. There has been no departure from the act of state doctrine.

It is clear even from the incomplete record before the Court that the trial court has not offended the act of state doctrine. GAC concedes that the act of state doctrine applies when a court "adjudicate(s) the legality of the acts of a foreign nation on its own territory" (Pet. 1269, 14). This Court has said:

> "The act of state doctrine in its traditional formulation precludes the courts of this country from inquir-

22. In its order denying GAC's motion for reconsideration of the November 18, 1977 production order, the trial court recognized the procedural necessity of the November 18, 1977 order:

> "Alternatively, should identification of the aforesaid documents housed in Canada, *at this time* be deemed to constitute a violation of Canadian law, which premise has not been shown to the satisfaction of this Court, still the order of November 18, 1977, must stand as the predicate to appropriate relief under Rule 37 of the Rules of Civil Procedure and in keeping with the Court's prior rulings herein." (Pet. 1236, 45a) (emphasis in original).

23. The court in *Westinghouse* also read *Société* as holding that "a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign country." 563 F.2d at 997.

> ing into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964).

The doctrine does not apply to acts of government personnel lacking "sovereign authority" in the premises, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 692 (1976); *see also The "Gul Djemal"*, 264 U.S. 90 (1924), nor does it shield commercial activities of foreign governments. *Dunhill, supra*, 425 U.S. at 695-706.

Fundamentally, the act of state doctrine cannot apply here because the trial court could not begin to "adjudicate the legality" of the uranium cartel on the merits,[24] since GAC refused discovery; instead the court imposed sanctions based on GAC's deliberate misconduct.

In any event, the trial court could not offend the act of state doctrine had it merely examined the facts to see whether the doctrine applied. Application of the doctrine requires taking evidence. GAC itself pleaded act of state in its answer to I&M's antitrust claims ("Eleventh Defense"), and it has the burden of proof of such defenses. *Dunhill, supra*, 425 U.S. at 691. GAC could scarcely complain if the court adjudicated the merits of GAC's own affirmative defense.

Moreover, but for GAC's default, the trial court would have had to consider the price-fixing claims to deal with the contract issues. GAC ignores the fact that the cartel-caused

24. Thus GAC's suggestion that the trial court should have sought the views of the State Department as to the foreign-relations effect of an adjudication on the merits (Pet. 1236, 13 n.8) is irrelevant, because no such adjudication was undertaken. Moreover, this Court has specifically cautioned against judicial requests for a statement of position by the Executive. *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 436. Here the Department of State has expressly volunteered, in forwarding Canadian diplomatic notes, that "Transmittal of these documents should not be understood as having implications with respect to foreign affairs of the United States" (Pet. 1236, 8a).

price increase, and GAC's role in it, bore directly on GAC's dispute with I&M over contractual relief, *i.e.*, GAC would be estopped from asserting a cartel-caused increase in price as an equitable excuse for escaping its contract with I&M. Resolving this issue required consideration of the facts of the cartel, although it might not necessitate an adjudication of the "legality" of the arrangement.

Had the court reached the merits of the act of state defense, GAC would have lost. GAC's lengthy recital of the supposed history of the cartel (Pet. 1236, 4-6) is mere lawyers' argument, wholly unsupported by the record in either court below and unsupported in fact. Even with inadequate discovery I&M and UNC offered evidence below showing that any involvement of Canadian government people in the uranium cartel was outside even their purported statutory authority and Gulf so knew,[25] that private producers (including Gulf) and government-owned commercial companies had formed and used the cartel to exchange market information, plot against middlemen, and fix prices for the world, including the United States, and that they met not only in Canada, but in South Africa, Switzerland, France, England, Australia, and the Canary Islands as well. None of the acts urged as the basis of GAC's liability was required by the Canadian government. The act of state defense was never intended to shield or disguise such conduct.

25. GAC produced in discovery a letter from its Canadian counsel advising that insofar as any Canadian officials sought to encourage Gulf's participation in cartel meetings, such officials were not acting on the basis of any statutory authority (T-I&M-3759). *See Dunhill, supra*, 425 U.S. at 695.

We submit that the concern the Canadian government[26] has expressed over the trial court's decision is based upon a misunderstanding of the sanctions order, which does not adjudicate the legality of the uranium cartel nor penalize GAC for complying with Canadian law, but instead rests on a broad range of discovery defaults. Such a misunderstanding does not create any issue worthy of review at this interlocutory stage.

d. There is no justification for review by common-law writ.

Finally, GAC urges this Court to review the trial court's March 2, 1978 Sanctions Order, possibly by common-law certiorari under 28 U.S.C. § 1651, because it is somehow "ancillary" to the New Mexico Supreme Court's ruling of that date and because an application for review in that court would seek "the same relief which that Court has already denied twice," on January 11 and March 2, 1978 (Pet. 1269, 15-16). This argument contradicts the statements of GAC's counsel before the New Mexico Supreme Court on March 1, 1978 concerning the Rule 37 motions then pending:

> "Yes, there is a question of an evidentiary hearing pending. Yes, there are fact questions of bad faith. Yes, there is a wide range of sanctions that may be imposed for an alleged two-year history to make nondiscovery. But that is not before this Court. What

26. Neither the lengthy unsworn position paper in GAC's Appendix (Pet. 1236, 13a-25a) nor the various Canadian diplomatic notes purport to state facts constituting an act of state with respect to the formation and operation of the uranium cartel. Even had they done so, this Court has held that such after-the-fact statements of position do not rise to the status of, nor may they retroactively characterize past conduct as, an act of state, and that they cannot be considered at all unless their authors are available for cross-examination under oath, which is not the case here. *Dunhill, supra,* 425 U.S. at 691-92 n.8, 694-95.

> is before this Court is the November 18 order reaffirmed on two separate occasions before those motions were ever filed." (Tr. 3/1/78 at 32).

Thus GAC itself urged the New Mexico Supreme Court to view the November 18 order as an issue separate from the history of massive nondisclosure asserted by I&M and UNC as the basis for Rule 37 sanctions, which GAC asked the Court to disregard. GAC even tried to present the November 18 order in the New Mexico Supreme Court outside the context of evidence of bad faith which supported the findings of fact in that order. GAC cannot now claim that the trial court's broadly based Sanctions Order of March 2, 1978 should be reviewed as a matter "ancillary" to the narrow procedural issue it presented to the New Mexico Supreme Court (Pet. 1269, 15).

The state supreme court rejected GAC's request to preempt a broad-based sanctions order by staying all Rule 37 sanctions. It held also that it would not review the November 18 order in a vacuum and that the trial court should apply Rule 37 based on the evidence of misconduct not available to the appellate court, subject to appellate review. Notably, GAC has not sought state supreme court review of the trial court's sanctions, preferring instead to continue in this Court its pursuit of review, not of the trial court's decision, but solely of the procedural order of the state supreme court which refused to preclude entry of a sanctions order. We need not speculate about GAC's reasons for pursuing this peculiar course and merely note that no accepted principle suggests a constitutional requirement that an appellate court "pre-clear," before entry, an order imposing sanctions for willful failure to discover.

GAC cannot claim that state court review of the March 2 sanctions order would be repetitive nor that "the relief sought is not available in any other court" than this one.

(Rule 31 (3)). Indeed it acknowledges that the March 2, 1978 order will be reviewed on appeal to the New Mexico Supreme Court (Pet. 1269, 12) and states that "the factual questions regarding good faith involved in the Sanctions Order and Default Judgment . . . GAC has expressly *not* sought to have reviewed here" (GAC Reply Memorandum on Application For Stay 3/15/78, 8-9) because they "may, and should, be reviewed in the New Mexico appellate courts" (*id.* 5).

Since GAC has not sought review of the findings of the trial court underlying the default judgment and sanctions order in this proceeding, review would be an empty exercise which this Court should not undertake, especially when it would exceed the authorization of 28 U.S.C. § 1257 (3) and thus be inconsistent with "the purpose of Congress . . . to keep within narrow confines [this Court's] appellate docket . . . ," a purpose which this Court has observed in another context should be honored "with redoubled vigor when the action sought to be reviewed here is an interlocutory order of a trial court." *Goldstein* v. *Cox,* 396 U.S. 471, 478 (1970). The order in question has been amended already at the trial level and will certainly be reviewed on appeal. No reason exists for this Court to reach out to review it now.

II.

In the Mandamus Proceeding (No. 77-1237)

a. This Court should not exercise mandamus jurisdiction over a state trial court.

The motion for leave and petition for mandamus in No. 77-1237 raise a threshold problem of this Court's jurisdiction, inasmuch as the petition seeks a writ of mandamus addressed, not to the New Mexico Supreme Court, the highest court of the state which has jurisdiction, but to an

inferior state court. We know of no case in which this Court has directed a mandamus to an inferior state court.

Neither of the cases relied upon by GAC to support jurisdiction seems in point. *Deen* v. *Hickman,* 358 U.S. 57 (1958), involved mandamus to the Texas Supreme Court, the highest state court. *Vendo Co.* v. *Lektro-Vend Co.,* 46 U.S.L.W. 3469 (Jan. 23, 1978), considered but did not grant a requested direction, in the nature of mandamus, to an inferior federal court which had erroneously interpreted this Court's mandate, and failed to act promptly to vacate an injunction. Assuming *arguendo* that this Court might issue mandamus to a federal district court in such circumstances, such an exercise of supervisory power over an inferior federal court does not support a similar power with respect to inferior state courts. Considerations important to the administration of a federal system, respect for the separate judicial systems of the States, and the Congressional scheme for review of state decisions by this Court counsel against existence or exercise of such power.

b. There has been no departure from this Court's mandate in No. 76-1640.

This Court has consistently turned aside attempts, based upon insubstantial claims of emergency, to employ the extraordinary writs to consider questions better settled by plenary review. In *Kerr* v. *United States District Court,* 426 U.S. 394 (1976), this Court said:

> "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will* v. *United States,* 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 382-385 (1953); *Ex parte Fahey,* 332 U.S. 258, 259 (1947). As we have observed, the writ 'has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdic-

> tion or to compel it to exercise its authority when it is its duty to do so."' *Will* v. *United States, supra,* at 95, quoting *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' *Will* v. *United States, supra,* at 95, the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' Ibid." (*id.* 402).

Since piecemeal review by mandamus fosters delay and inefficiency and circumvents the Congressional final judgment rule, this Court has cautioned that even for the federal Courts of Appeals a "judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." (*id.* 403). *A fortiori,* the policy to conserve the finite judicial resources of this Court, embodied in 28 U.S.C. § 1257(3), requires that any "party seeking issuance of the writ have no other adequate means to attain the relief he desires." *See Kerr* v. *United States District Court, supra* at 403. There will be time enough to consider the question of review in this Court after review has been completed in the state system. This Court held in Ex parte *Fahey,* 332 U.S. 258 (1947), on an original application for mandamus in this Court:

> "These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes." (*id.* 260).

GAC's request in No. 77-1237 for interlocutory review in the guise of a petition for a writ of mandamus to enforce

the mandate in No. 76-1640 seeks to foreclose issues of fact and law never presented to or decided by this Court and not included within its mandate. "The power to compel obedience to the mandate turns on whether the lower court has obstructed enforcement of it . . ." , *United States* v. *United States District Court,* 334 U.S. 258, 265 (1948), which is not the case here. The writ may be employed to make the Court's previous ruling effective, but it does not extend to new issues not decided. *Fisher* v. *Hurst,* 333 U.S. 147 (1948); *United States* v. *Haley,* 371 U.S. 18 (1962); *see also In re Sanford Fork and Tool Co.,* 160 U.S. 247, 255, 256 (1895); *NAACP* v. *Alabama,* 360 U.S. 240 (1959).

Since I&M was not even a party to No. 76-1640, and has no agreement to arbitrate, it cannot be seriously contended that this Court ruled in that case that GAC had a right to a stay of the trial of its dispute with I&M pending arbitration with UNC.

The issues presented in No. 76-1640 concerned the validity of the April 2, 1976 injunction insofar as it prevented GAC from instituting an action in federal court, joining parties to a pending federal action, or asserting claims against other parties to a pending federal action. GAC claimed a concern to avoid an adjudication of its dispute with UNC in a proceeding separate from the utility customers, because of the risk of inconsistent adjudications (Pet. No. 76-1640, 8). GAC now seeks precisely such an adjudication by pressing for arbitration with UNC alone in San Diego. GAC indicated it had no desire to stay the entire trial in Santa Fe; it now seeks that as well. Rather, GAC said that it had acted to join I&M and Detroit in the Santa Fe case to prevent "inconsistent" results and that a decision on the injunction would not advance the termination of the Santa Fe case. Since GAC's alleged need to pursue this litigation with I&M, Detroit (utilities whose contracts contain no arbitration clause) and UNC was "the premise on which the Court disposed of the case", *NAACP*

v. *Alabama, supra,* 360 U.S. at 243, it may not now be repudiated to construct a new version of what was "necessarily decided", *United States* v. *Haley, supra,* 371 U.S. at 19, in that case.

This Court granted certiorari in No. 76-1640 and ruled without further briefing that the injunction was invalid under *Donovan* v. *City of Dallas,* 377 U.S. 408 (1964), stating that the New Mexico Courts could not hamper

> "GAC's desire to *defend itself by impleading UNC* in the federal lawsuits and federal arbitration proceedings brought against it by the utilities. This, of course is something which GAC has every right to *attempt* to do under Fed. Rule Civ. Proc. 14 and the Federal Arbitration Act. The right to *pursue* federal remedies and *take advantage of* federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan.*" 98 S. Ct. at 79 (emphasis supplied; footnotes omitted).

It did not consider complex factual issues of arbitrability or waiver on the abbreviated record before it. The Court stated that it was "impossible, of course, to foresee" all circumstances in which GAC might assert claims in federal proceedings. 98 S. Ct. at 79 n.12. But in so ruling, we submit, this Court did not undertake to decide that all impleader attempts by GAC should be granted, or all asserted arbitration rights should be sustained, any more than it decided that there was merit in the entire range of potential federal claims by GAC which it was "impossible, of course, to foresee." GAC's present effort to obtain review is based upon an injection of elastic qualities into the Court's mandate which it did not contain and could not have anticipated.

GAC is in error when it claims that the decision in No. 76-1640 "rejected" any possible finding that GAC had waived its right to arbitrate (Pet. 1237, 13), or that the issues raised by UNC in opposition to GAC's December 6,

1977 motion for a stay were "substantially the same reasons set out in its prior Brief in Opposition in this Court" (*id.* 9), or that the decisions of December 16 and 27, 1977 "interfere" (*id.* 13) with contractual rights to arbitrate which this Court sustained, or that "the very same grounds that Judge Felter relied upon in reaching his 'Decision(s) of the Court' were before this Court on its consideration of GAC's petition for a writ of certiorari" (*id.* 14), or that the "Court rejected the waiver argument when it remanded the case with specific reference to the arbitration remedy" (*id.* 14), or that "Judge Felter has violated this Court's mandate by sustaining the very same claim that this Court rejected" (*id.* 14), or that continuation of the trial in Santa Fe somehow conflicted with this Court's decision (Pet. 1269, 6), or that the subsequent Rule 37 ruling "brought to fruition Judge Felter's repudiation of this Court's decision" (*id.* 13), or that "the only course proper for Judge Felter upon the issuance of this Court's decision" was to stay "proceedings in his court until there was an opportunity to raise in federal arbitration proceedings and in federal courts the questions which GAC should have been permitted to raise there twenty months earlier" (*id.* 13), since this Court never adjudicated arbitrability, waiver, or any of the other issues considered in the trial court's December 16 and 27 rulings on GAC's motion, and certainly directed no stay of the Santa Fe case. These misapprehensions of counsel do not justify review.

c. There has been no "frustration" of the mandate of this Court.

Nor have subsequent proceedings frustrated this Court's mandate, assuming *arguendo* that the Court may review in No. 77-1237 matters subsequent to the trial court's action on the mandate. *See Fisher* v. *Hurst, supra,* 333 U.S. at 150. Some background is necessary: the injunction reviewed in No. 76-1640 never barred GAC from asserting arbitration

rights—federal or state—before the trial court, as the judge who signed it confirmed in open court (Tr. 4/2/76, 7-8), and as GAC has conceded (Reply No. 76-1640, 7-8). It involved only what was perceived as duplicative assertion of claims "in any other forum" (Pet. No. 76-1640, 3a). Soon after the injunction GAC answered UNC's complaint, demanding arbitration with UNC only if joint arbitration with Duke and Commonwealth were directed, and abjuring any request to arbitrate with UNC under the 1973 Supply Agreement (Reply, No. 76-1460, App. A). The lawsuit went forward. At GAC's instance I&M and Detroit were joined.

Only after the case had been on trial for a month—and seemed to be going badly for GAC— did GAC move for a stay pending arbitration with UNC of the Duke and Commonwealth issues in Charlotte and Chicago and of the same issues under the 1973 Supply Agreement in San Diego. This motion involved matters not within the scope of this Court's mandate. GAC made no claim in its motion that the relief it requested was required by the mandate of this Court. It was the trial court's clear duty, and certainly within its power, to decide whether GAC's assertion of rights under the Federal Arbitration Act against some but not all parties, and as to some but far from all of the issues on trial, required it to stop the trial. GAC's motion called for consideration of whether GAC had any right to compel arbitration by UNC based upon GAC's contracts with Duke or Commonwealth, *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964), whether arbitration under the 1973 Supply Agreement had not been waived in GAC's pleadings and by its other inconsistent acts and whether other parties were thereby prejudiced, *Reid Burton Const., Inc.* v. *Carpenters District Council,* 535 F.2d 598 (10 Cir. 1976), *cert. denied,* 429 U.S. 907 (1976); *Cornell &*

Co. v. *Barber & Ross Co.,* 360 F.2d 512 (D.C. Cir. 1966); *In re Tsakalotos Navigation Corp.,* 259 F. Supp. 210 (S.D.N.Y. 1966), whether the antitrust claims and defenses were arbitrable and whether other issues were so closely connected thereto as to make the entire controversy non-arbitrable. *Cobb* v. *Lewis,* 488 F.2d 41 (5 Cir. 1974); *American Safety Equipment Corp.* v. *J. P. Maguire & Co.,* 391 F.2d 821 (2 Cir. 1968); *Aimcee Wholesale Corp.,* v. *Tomar Products, Inc.,* 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

Moreover, it was fully within the trial court's power to stay further action by GAC pursuant to the arbitration demands once it determined that GAC had no right to compel arbitration, and this is true whether the procedures for state-court enforcement of claims under the Federal Arbitration Act derive from state or federal law. *Netherlands Curacao Co., N.V.* v. *Kenton Corp.,* 366 F. Supp. 744 (S.D.N.Y. 1973); *cf. Leesona Corp.* v. *Cotwool Mfg. Corp.,* 315 F.2d 538 (4 Cir. 1963).

All of these issues are raised in GAC's pending appeal. None was foreclosed by this Court's previous ruling. GAC's attempt to pre-empt the pending appeal by pursuing it here as well as in the highest state court should be rejected.

Conclusion

The multiple petitions filed in this Court leave grave doubt as to just what GAC proposes for review should the writs be granted, in view of its many concessions here and below. Indeed, a pervasive vice of the instant petitions is that they nowhere define the scope of the review sought in this Court, as against that readily available on appeal in

the New Mexico courts or now being pursued there. If this Court is to review a sanctions order without considering the factual basis for its entry, and the order staying arbitration only to the extent that it raises questions not already encompassed by the pending appeal, and the November 18 order (so far as not already moot) without regard to the history of contumacy in discovery from which it arose, the suspicion naturally arises that the petitions ask this Court to undertake some sort of topsy-turvy role as the forum in which GAC may pre-empt the state appellate process and seek short-cut review of those questions it does not choose to present in the New Mexico courts on a proper appeal. This seems hardly the role envisioned for this Court by Article III, and it is a role which this Court has carefully avoided and should avoid in this case.

In Nos. 77-1236 and 77-1269 the refusal of the New Mexico Supreme Court to issue an extraordinary writ as to an interlocutory discovery order, undertaking a study of the record and an anticipatory review of the trial court's exercise of discretion, rests upon an independent and adequate state ground and should not be reexamined by this Court, especially where GAC's applications of January 5, 1978 and February 20, 1978 for an extraordinary writ have been rendered moot by succeeding events, and all the matters complained of by GAC, if they remain after trial and judgment, may be raised on appeal. There is no justification for the issuance of a common-law writ of certiorari to review the trial court's interlocutory sanctions order in these circumstances when no emergency exists.

As to No. 77-1237, the mandate of this Court in No. 76-1640 was scrupulously fulfilled; GAC's argument that the mandate foreclosed issues of fact and law which were not before this Court when it issued its mandate should not be

entertained, particularly when such issues are currently being considered by the New Mexico Supreme Court on an appeal based on a full record. None of the traditional grounds for review exists in this case, and the petitions and the motion should be denied.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
Attorney for Respondent
Indiana & Michigan Electric Company
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

ROGERS M. DOERING
ALBERT X. BADER, JR.
LINDSAY A. LOVEJOY, JR.
Simpson Thacher & Bartlett
JAMES T. PAULANTIS
Johnson, Paulantis & Lanphere
Of Counsel.

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